No. 11458

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PAUL W. SAMPSELL, L. BOTELER and STEWART McKEE, Trustees of the Estate of Christ's Church of the Golden Rule, a corporation, bankrupt,

Appellants,

vs.

THEODORE M. MONELL,

Appellee.

APPELLANTS' OPENING BRIEF.

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I.

Statement of the Case.

This is an appeal from an order of a District Judge of the Northern District of California, affirming an order of a Referee in Bankruptcy awarding to the appellee, as counsel for certain conditional sales contract claimants, an attorney's fee in the sum of $2500.00 to be paid out of the bankrupt estate for legal services in the bankruptcy proceedings of Christ's Church of the Golden Rule, a corporation, pursuant to the terms of such contracts.

II.

Statement of Pleadings and Facts Showing Jurisdiction.

The bankruptcy was commenced on November 1, 1945, in the District Court of the United States, Southern District of California, Central Division, as the court of bankruptcy of primary jurisdiction, by the filing by the corporation of an original petition under Chapter XI of the National Bankruptcy Act of 1898, as amended, for an arrangement between the corporation and its creditors. [Tr. p. 150.] Thereafter and on November 19, 1945, upon its voluntary petition filed in the same case, the corporation was adjudicated a bankrupt and the case was referred to a referee in bankruptcy for further proceedings. [Tr. p. 146.] On January 4, 1946 the appellants were appointed trustees in bankruptcy of the estate and qualified as such on January 5, 1946. [Tr. p. 148.] On November 26, 1945, ancillary proceedings in bankruptcy in aid of the said primary court were commenced and thereafter prosecuted in the District Court of the United States for the Southern Division of the Northern District of California, as an ancillary court of bankruptcy, by the filing of a petition by the primary receivers in bankruptcy appointed by the primary court and the making of an order by the ancillary court appointing ancillary receivers for last named district, and referring further proceedings to Hon. Burton J. Wyman, a Referee in Bankruptcy of said ancillary court. [Tr. p. 2.] Sec. 2 (20) of the Bankruptcy Act provides for

ancillary proceedings in courts of bankruptcy in aid of a receiver or trustee appointed in any other court of bankruptcy. Sec. 24a of the Bankruptcy Act invests in circuit courts of appeal appellate jurisdiction from courts of bankruptcy from proceedings in bankruptcy.

III.
Opinion of the Court Below.

The District Judge did not render any opinion. The Referee in Bankruptcy, as a part of his certificate on review from the order of allowance, rendered an opinion. [Tr. p. 94.]

IV.
Statement of Facts.

At the time of the commencement of the bankruptcy proceedings on November 1, 1945, the bankrupt was in possession of, and operating through its agent, William W. Denton, a sawmill located about ten (10) miles Northwest of Willitts, Mendicino County, California. The bankrupt's title to the real estate and to some of the equipment, was subject to two conditional sales contracts, upon which there were balances due, one covering the real estate and held by Delancy Lewis and Doris B. Lewis, his wife, and the other covering certain equipment and held by West Coast Redwood Corporation, a corporation. The attorney for the holders of these conditional sales contracts was Theodore Monell.

The Trustees in Bankruptcy, on March 29, 1946, filed with the referee a petition for the sale of the sawmill. [Tr. p. 4.] The said conditional sales contracts were described in the said petition. The referee thereupon

issued an order directing the holders of the said conditional sales contracts to appear before him and show cause at a time and place specified, why the said sawmill should not be sold, either free and clear of claims, or subject to liens and claims. [Tr. p. 11.] Thereafter and on April 15, 1946, the said conditional sales contract-holders filed their answer to such petition. [Tr. p. 36.]

Thereafter, on April 2, 1946, the said conditional sales contract-holders, through their said attorney, filed with the referee their petition in reclamation of the property covered by said conditional sales contracts. [Tr. p. 12.] The prayer of such petition was that the property should either be returned to said conditional sales contract-holders, or the Trustees in Bankruptcy should pay to them the balances due under the contracts. It was also prayed in said petition in reclamation that $3500.00 be awarded to Theodore Monell as attorneys' fees, in line with a provision in the said contracts to the effect that in the event any action was brought by the holders of the contracts to enforce the terms thereof and they should prevail in such action, they should be entitled to *reasonable* attorneys' fees to be fixed by the court and taxed as a part of the course of suit. Of this amount, $500.00 was claimed under the Lewis contract, and $3000.00 under the West Coast Redwood Corporation contract. On April 4, 1946, the Referee issued, pursuant to said petition in reclamation, an order to show cause directed against the Trustees in Bankruptcy. [Tr. p. 34.] On April 9, 1946, the Trustees in Bankruptcy filed their answer to said petition in reclamation. [Tr. p. 35.]

The said Trustees' petition for leave to sell, and the said petition in reclamation, and the respective answers thereto,

were heard before the Referee on April 15, 1946. [Tr. p. 80.] At that time, the balances claimed by said conditional sales contracts holders to be due under their contracts were agreed to by the Trustees in Bankruptcy. The Referee fixed June 1, 1946, as the time limit within which the properties should either be sold by the Trustees in Bankruptcy and these balances and other liens paid out of the proceeds, or the properties should be returned to the holders of the conditional sales contracts. There was some rolling stock involved in the sale upon which others held unpaid conditional sales contracts. [Tr. p. 62.] Some time was required thereafter by appellants' counsel in which to prepare a written order that in form satisfied all the parties. Such an order was finally prepared and presented to the Referee on May 27, 1946, at which time he signed and entered the order above mentioned, clearing title, and determining amounts due under liens and of sale. In such order he fixed $2500.00 as the compensation of Theodore Monell, as attorney for Delancy Lewis and Doris B. Lewis, his wife, and West Coast Redwood Corporation, a corporation, for legal services rendered to them herein. [Tr. p. 51.]

Thereafter the June 1st time limit was extended by stipulation of these parties to June 17, 1946. [Tr. p. 48.] In the meantime, the Trustees in Bankruptcy effected a final sale of the sawmill for a gross price of $52,000.00. [Tr. pp. 98-99. Note No. 3.] An escrow for the completion of the sale and the payment of the balances due these conditional sales contract-holders was opened with Title Insurance and Guaranty Co., of San Francisco, and was finally completed and closed with the payment of the balances due Mr. Monell's clients.

NOTE: *The Referee inadvertently included in his certificate on review a return of sale of real and personal property* [Tr. p. 71, 40] *that does not have any bearing upon the controversy here. The sale therein referred to collapsed and was never confirmed for reasons that are unimportant here. The property was finally sold, and the sale confirmed for $52,000.00, as appears from Note No. 3 in the Referee's Certificate* [*Tr. p. 98*] *and the letter of Reuben G. Hunt to Judge Roche of September 15, 1946.* [Tr. p. 114.] *The said return of sale should, therefore, be disregarded, in determining the net amount received by the bankrupt estate from the transaction. This net amount was about $11,500.00 before the payment of any fee to Mr. Monell, as appears from the said letter.* [Tr. p. 114.] The pertinent portion of the letter reads as follows:

> "This morning, based upon information furnished to me by the title company handling the escrow in connection with the sale of the Denton-James (Willits) Sawmill, I stated to you in open court that, if the $2500 fee was allowed to Mr. Monell, the bankrupt estate would receive a net of about $3800 from the transaction. After checking again with the title company I find that this statement was erroneous. It left out of consideration the original deposit of $5200 with the trustees by the purchasers. If the $2500 fee is allowed, the estate will receive a total of $8919.19, instead of $3800.00. In other words the maximum available from the transaction for the final amount allowed Mr. Monell, and for the estate, is about $11,500.00. In the trustee's brief it is stated that the maximum would be about $12,000.00."

V.
Questions Presented.

The sole question presented is whether or not, under all the circumstances of this case, the award of $2500.00 to Theodore Monell was unreasonable, excessive, and an abuse of discretion on the part of the lower court; and, if so, to what extent the award should be modified to provide a reasonable fee.

VI.
Specification of Error.

The lower court erred in allowing Mr. Monell $2500.00; and a reasonable allowance, if all the factors which go to make up a reasonable fee are taken into consideration, would have been not less than $500.00 and not more than $1000.00.

VII.
Summary of the Argument.

A. *Attorney's Fees Allowed in Bankruptcy Proceedings Must Always be Reasonable.*

B. *The Factors Which Make Up a Reasonable Fee Show That the Fee Allowed Was Unreasonable.*

C. *The Amount of the Fee Should be Based Upon What Mr. Monell's Services Were Worth to His Clients and Not Upon the Cooperation He Gave the Trustees.*

D. *Mr. Monell's Clients Did Not Have Absolute Title and the Trustees Had the Right to Sell the Property and Pay Them Off Even if He Had Not Cooperated by Extending by Stipulation the Time For Such Sale.*

E. *The Bankrupt Estate Benefited by the Transaction to the Extent of a Gross of $11,500.00 Instead of $40,000.00 as Set Up by the Referee in His Certification on Review.*

F. *The Amount Collected by Mr. Monell For His Clients Should Not Be Given Much Weight in Determining a Reasonable Fee.*

G. *The Amount Awarded Mr. Monell Was Never Approved by the Trustees or Their Counsel.*

VIII.
ARGUMENT.

A. Attorneys' Fees Allowed in Bankruptcy Proceedings Must Always Be Reasonable.

An attorney's fee allowed in bankruptcy must always be *reasonable. In re Owl Drug Co.,* D. C., Nev. 31, A. B. R., N. S., 763, 16 F. Supp. 139. The results achieved constitute the factor of greatest determinative weight. *In re Hoffman,* D. C., Wis. 23 A. B. R., 19, 173 F. 234. The results achieved here by Attorney Monell in protecting his clients, consisted of securing for his clients the admitted balances due them under their conditional sales contracts without contest, instead of their being required to take the properties back. What, then, is a reasonable fee to be allowed him for such services? Under the circumstances, we submit that any allowance in excess of from $500.00 to $1000.00 would be excessive.

It is true that the Referee is vested with a wide discretion in making allowances of attorney's fees, but such discretion can be abused and we contend that here it has

been abused. Appellate courts will reduce the allowances where such discretion has been abused. While the amount is left to the sound discretion of the referee, this power is not discretionary in the sense that the Referee is at liberty to award more than a fair and reasonable compensation. *In re Owl Drug Co., supra.*

The Act of Congress of June 7, 1934, Section 3, provides that the compensation allowed a receiver or trustee, or an attorney for a receiver or trustee, shall in no case be excessive or exorbitant, and the court, in fixing such compensation, shall have in mind the conservation and preservation of the estate of the bankrupt and the interests of the creditors therein. We think this principle should be applied here with respect to the final amount to be allowed to Mr. Monell.

We contend that a reasonable fee here for Mr. Monell would be not less than $500.00 and not more than $1000.00. By way of analogy, we refer to probate fees in California. The services performed by Mr. Monell were ordinary. None of them were extraordinary. The amount claimed by his clients was conceded and the collection of the money was certain. It only remained for Mr. Monell to prepare and file in court the papers necessary to secure the money. The amount of money involved was about $32,000.00. In a California probate estate, where the amount of ordinary services of an attorney for an executor or an administrator would be at least twice the amount required of Mr. Monell here, the fee for such ordinary services in an estate of that size would be $1020.00. Cal. Prob. Code, Secs. 901, 910.

B. The Factors Which Make Up a Reasonable Fee Show That the Fee Allowed Was Unreasonable.

In the determination of the amount to be allowed out of a bankrupt estate to an attorney for services, the following factors may be taken into consideration:

(1) The labor, trouble and time involved.

(2) The intricacy of the questions involved.

(3) The character and importance of the matter.

(4) The learning, skill and experience exercised.

(5) The opposition encountered.

(6) The results achieved.

(7) The size of the estate and its ability to pay.

(8) The opinion evidence touching the reasonableness of the fee requested.

(9) Whether a fee was certain or contingent.

(10) The economical spirit of the bankruptcy act itself.

In re Detroit International Bridge Co., C.C.A. 6, 111 F. (2d) 235, 42 A.B.R., N.S., 856;

In re Barceloux, C.C.A., 9, 74 F. (2d) 288, 27 A.B.R., N.S., 686;

Steere v. Baldwin Locomotive Works, C.C.A. 3, 98 F. (2d) 889, 38 A.B.R., N.S., 37;

Schnader v. Reading Hotel Co., C.C.A. 3, 105 F. (2d) 572, 48 A.B.R., N.S., 69;

In re Herald-Post, DC, Ky., 21 F. Supp. 231, 35 A.B.R., N.S., 94.

The transcript of record in the case discloses the nature of the services performed by Mr. Monell. These consist of four classes: (1) conferences; (2) appearances in court; (3) preparation and filing of papers; and (4) and examination by Mr. Monell of papers served and filed by the trustees.

(1) *Conferences*: The only evidence upon this subject is the statement of Mr. Monell "There have been numerous discussions." [Tr. p. 86.] There is nothing to indicate how many discussions, or of what nature, or of what importance, or how much time was spent.

(2) *Appearances in court*: One, that of April 15, 1946. [Tr. p. 80.]

(3) *Preparation of papers*: A list follows:

1. Answer of West Coast Redwood Corporation and De Lancey Lewis and Doris B. Lewis to Petition for an Order of Sale (Denton Sawmill). [Tr. p. 36.]
2. Petition in Reclamation. [Tr. p. 12.]
3. Order to Show Cause and Setting Day of Hearing. [Tr. p. 34.]

(4) *Papers Examined*:

1. Petition for an Order of Sale (Denton Sawmill). [Tr. p. 4.]
2. Order to Show Cause (Denton Sawmill). [Tr. p. 11.]
3. Answer of Trustees to Petition in Reclamation. [Tr. p. 35.]
4. Order Clearing Title, Determining Amounts Due Under Liens, and of Sale. [Tr. pp. 51, 86.]
5. Stipulation *re* Willits Sawmill. [Tr. p. 149.]

When we examine the facts to be taken into consideration in determining a reasonable fee for Mr. Monell under such factors, we find:

1. *The labor, trouble and time involved.* The labor and trouble was little, as appears from the record. The procedure was merely routine. No contest or litigation was involved. The amount sought by Mr. Monell's clients was agreed to by the Trustees. The situation was akin to the preparation and filing of the necessary papers to establish an admitted claim against a bankrupt or a probate estate. The time involved is not disclosed by the record, but it could not have been much under the circumstances.

2. *The intricacy of the questions involved.* None of the questions involved were intricate, complex or vexatious. They were all simple.

3. *The character and importance of the matter in hand.* This was either the reclaiming of property or the securing of a balance due thereon of about $32,000.00, without contest, and with certainty of success in either event.

4. *The learning skill and experience involved.* The ordinary intelligence of a lawyer who has had experience in bankruptcy practice was all that was required.

5. *The opposition encountered.* None.

6. *The results achieved.* The collection of about $32,000.00 upon an admitted claim from a solvent debtor, ready, able and willing to pay.

7. *The size of the estate and its ability to pay.* There inadvertently appears in the record, in connection with the certificate on review of the Referee [Tr. p. 71] a return of sale of real and personal property to A. J.

Barbee for $66,600.00. [Tr. p. 40.] This sale was never confirmed for reasons which are unimportant here. At a new sale the property was sold for a gross of $52,000.00, and the new sale was confirmed, as appears from the Referee's Certificate on Review written by Reuben G. Hunt, counsel for the trustees, to Judge Roche of the lower court on September 16, 1946 [Tr. p. 114 and "IV Statement of Facts" above]. The maximum amount left over for the bankrupt estate after the payment of all liens, including those of Mr. Monell's clients, and before the payment of any fee to Mr. Monell, was about $11,500.00. There were other liens besides those of Mr. Monell's clients to be satisfied out of the gross purchase price of $52,000.00, as appears from the Referee's order of May 27, 1946. [Tr. p. 51.] It seems to us that a charge of $2500.00 out of $11,500.00 to take care of Mr. Monell's fee is all out of proportion to the ability of the bankrupt estate to pay especially since the trustees and their counsel are entitled to be paid out of this fund for their services in creating it.

8. *Opinion evidence touching the reasonableness of the fee requested.* None was offered.

9. *Whether the fee was certain or contingent.* The fee was certain and not contingent. Mr. Monell would be paid by the bankrupt estate if it kept and sold the property; and by his clients if it was returned to them.

10. *The economical spirit of the bankruptcy act.* A charge of $2500.00 against a fund of $11,500.00, particularly in view of the fact that the trustees and their counsel are entitled to be paid out of this fund for their services in connection with its creation, would violently upset any economical spirit.

C. The Amount of the Fee Should be Based Upon What Mr. Monell's Services Were Worth to His Clients and Not Upon the Cooperation He Gave the Trustees.

We contend that any award to Mr. Monell must be based upon what his services were worth to his clients, and cannot be based upon the indirect benefit the bankrupt estate may have received as a result of his cooperative attitude. The theory of the provision in the conditional sales contracts for the payment of a fee is that the holders of the contracts will be reimbursed for the money they would otherwise be reasonably required to pay him for his services. This was not a case where the result hinged upon the collection of money. Mr. Monell's clients were safe in any event. If they did not get their money they got back their property of equivalent value. In a simple collection of an agreed amount of $32,000.00, without contest, from a solvent debtor it seems to us inconceivable that Mr. Monell's services to his clients were worth $2500.00, or any more than between $500.00 and $1000.00.

D. Mr. Monell's Clients Did Not Have Absolute Title and the Trustees Had the Right to Sell the Property and Pay Them Off Even if He Had Not Cooperated by Extending by Stipulation the Time for Such Sale.

The Referee apparently took the view that Mr. Monell's clients had absolute title to the properties involved, that the Trustees in Bankruptcy had no interest therein, and that Mr. Monell's clients could have insisted upon its return to them, but out of good grace and in a spirit of cooperation they permitted the properties to be sold by

the Trustee and the bankrupt estate benefited thereby, by the stipulation for the extension of the time originally set. (Tr. p. 44.) We think this is an erroneous conception of the law.

The nature of the title of a holder of a conditional sales contract is set forth in the case of *County of San Diego v. Davis*, 1 Cal. (2d) 145, where the court said:

> "In conditional sale the title in the seller is for security only, to assure the payment of the purchase price. It carries with it none of the ordinary incidents of ownership. The buyer has the possession and use of the property to the complete exclusion of the seller, subject only to the seller's remedies in case of default. *Both as a practical and a legal matter the buyer is the beneficial owner.* (See Walker v. Houston, 215 Cal. 742 (12 Pac. (2d) 952, 87 A. L. R. 937).)"

The case of *In re Ideal Laundry*, 10 F. Supp. 710, cited by the Referee in his opinion, makes no reference to the case of *County of San Diego v. Davis*, 1 Cal. (2d), 145. Judge Lindley in the *Ideal Laundry* case follows the theory of the case of *In re Lake's Laundry*, C. C. A. (2d) 29 A. B. R. 498, 79 F. (2d) 326 later decided, wherein it was held in a reclamation proceeding under the old Section 77B of the Bankruptcy Act, that property held by a conditional vendee is the property of the conditional vendor until the contract price is paid and until such payment the vendee had no title thereto, and that a petition to reclaim must be promptly granted. This ruling was later repudiated by the same circuit in the case of *In re White Plains Ice Service*, C. C. A. (2d), 42 A. B. R. N. S. 33, 109 F. (2d)

913, wherein the court held that the bankrupt court had the power to give trustees in bankruptcy a reasonable time to elect whether to pay up the balance due on a conditional sales contract, or return to the vendor the property covered thereby. To the same effect: *In re Burgemeister Brewing Co.,* C. C. A. 7, 31 A. B. R., N. S., 446, 84 F. (2d) 388; *Lincoln Alliance Trust Co. v. Dye.,* C. C. A. (2d), 41 A. B. R., N. S., 475, 108 F. (2d) 38; *Barth v. Pearlstein,* C. C. A. (2d), 49 A. B. R., N. S., 411, 128 F. (2d) 253.

Even if Mr. Monell had not cooperated by extending the time limit and had insisted upon compliance with the court order limit of June 1, 1946, the bankruptcy court had ample power, in view of the authorities we have cited, to have extended the limit for a reasonable time under the circumstances presented. It is settled that a referee in bankruptcy may reconsider and vacate his previous orders. *Pfister v. Northern Illinois,* 317 U. S. 144, 51 A. B. R., N. S., 99, 63 S. Ct. 133, 87 L. Ed. 146. Mr. Monell's clients benefitted by the extension of the time limit to June 17, 1946 because a sale was pending on June 1st that would result in the payment to them of the balances due. If they had opposed the extension they would have been subject to a long and expensive litigation that would probably have resulted only in their receiving money and not property. Furthermore, the Referee's order of May 27, 1946 [Tr. p. 51] provided for the payment of interest on the balances due up to the time of payment. Any cooperation of Mr. Monell, therefore, was for the interests of his clients.

E. The Bankrupt Estate Benefitted by the Transaction to the Extent of a Gross of $11,500.00 Instead of $40,000 as Set Up by the Referee in His Certificate on Review.

We do not know from where the Referee secured the $40,000.00 figure [Tr. p. 98-99], unless from the appraisement of $42,000.00. [Tr. pp. 72, 85.] At all events, he assumes that the gross value of the property, subject to liens, was the total value to the bankrupt estate instead of the value of the equity, which is the true value. And this true value, as we have seen, was but $11,500.00, after paying off all conditional sales contracts including those held by persons other than Mr. Monell's clients upon other property included in the sale. This $11,500.00 figure is disclosed by the letter of Reuben G. Hunt to Judge Roche of the lower court dated September 16, 1946 [Tr. p. 114, and above under "IV. Statement of Facts".]

F. The Amount Collected by Mr. Monell for His Clients Should Not Be Given Much Weight in Determining a Reasonable Fee.

The Referee, and Mr. Monell, stress the amount involved as the most important of all of the factors in the determination of the allowance to be made. The allowance of $2500.00 was a little less than 8% of the amount collected upon an admitted claim with a certainty of payment. Suppose, with the same amount of work and under the same conditions, the amount involved were $100,000.00, would a fee of 8% of that amount, or $8,000.00, be reasonable? The amount involved is only one of the factors that goes to make up a reasonable fee; and, as we have seen above in Point A of this argument, is only one of a number of factors.

G. The Amount Awarded Mr. Monell by the Lower Court Was Never Approved by the Trustees or Their Counsel.

Some question arose in the lower court whether or not, by reason of an inadvertent wording of the approval of the order of the Referee signed by counsel for the Trustees at the end of the order of the Referee making the award [Tr. p. 64], the Trustees had consented to the allowance. This was cleared up by a motion made before the lower court by the Trustees for an order clarifying this approval and directing that it be disregarded. [Tr. p. 116.] The motion was granted [Tr. p. 133] with the consent of Mr. Monell. [Tr. p. 128.]

IX.

Conclusion.

We submit that under all the circumstances of this case the award of $2500.00 was excessive, unreasonable, and an abuse of the discretion invested in lower courts in matters of this kind and that the award should be reduced to a figure somewhere between $500.00 and $1000.00.

Dated: January 22, 1947.

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